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April 9, 2003

Country of Origin Labeling Program
Agricultural Marketing Service
USDA Stop 0249
Room 2092-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0249

Re: Comments on Country of Origin Labeling Guidelines
Notice of Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946
October 11, 2002, (Volume 67, Number 198, Pp. 63367-63375)

Dear Sir or Madam:

The Organization for Competitive Markets (OCM) is a multidisciplinary nonprofit organization focusing on antitrust, competition and marketing issues in agriculture. We are national in scope. Our members include farmers and ranchers of virtually all commodities, as well as academics, lawyers, agribusiness persons, and policy makers.

OCM appreciates the work of AMS and other USDA personnel in this matter. We hope our comments are helpful. We note here that our comments dated February 21, 2003 as to the November 21, 2002 Country of Origin Labeling Cost Estimate contained substantive comments on guidelines, in addition to comments on the cost estimate, which we incorporate here by reference.

OCM has signed on to the joint letter containing comments from over 20 organizations representing producers and consumers which is being submitted on this date. In addition to the comments in the Joint Letter, OCM would like to add the following comments. The focus of these comments is on harmonizing the standards of enforcement as between all covered entities, and eliminating the incentive for private industry to engage in intrusive activities vis a vis their suppliers.

I. Harmonizing the Enforcement Regime as to All Covered Entities

USDA-AMS should harmonize the substantive standards governing enforcement as between retailers and other covered entities despite the fact that the language differs as between them in the statute. Section 283(a) of the Act provides for substantive and procedural enforcement standards as against all covered entities except retailers by referring us to Section

253 (7 U.S.C. § 1636b). Section 283(b) and (c) contain the substantive and procedural enforcement standards as against retailers. Though the language differs, the Secretary has the discretion to harmonize the standards through regulations.

We suggest harmonizing the substantive enforcement standard with that of Section 283(c) in that a "willful" violation is necessary for a fine to arise. This provision applies to retailers in the Act. The non-retailer substantive standard requires the Secretary to "consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the ability of the person that has committed the violation to continue in business." 7 U.S.C. §1636b. As to the first prong of the non-retailer standard, the Secretary can choose to require willfulness or intent as the standard for "gravity of the offense." Further, the Secretary can choose to implement a 30 day notice and correction period prior to making the determination of "gravity of the offense."

The result would be uniformity of all regulated entities under the labeling act despite the fact that enforcement standards were gleaned from two different places in the law.

Further, the standards we suggest will constitute a *de facto* safe harbor for good faith violations of the Act. This unwritten safe harbor is important to preserve the confidence in the system of self-verification that we support.[1] In other words, if suppliers self verify the country of origin to buyers, the buyer can rely upon that supplier information without fear of liability.

II. Clearly Defining Rights and Responsibilities

USDA-AMS should define a very simple and elegant method of information transmission by clearly articulating the relevant rights and responsibilities at each transaction point. We suggest the following.

First, the duty for sellers to convey information should be addressed. For example, "Any covered entity selling a covered commodity (seller) to an entity other than the ultimate consumer shall have the duty to provide information as to the country(s) of origin of the covered commodity unless it is exclusively of domestic origin."

Second, the mirror image duty for buyers to procure information, and the companion right to rely on that information exclusively, should be addressed. For example, "Any covered entity purchasing a covered commodity (purchaser) shall require the seller to self certify the country(s) of origin of the covered commodity unless it is exclusively of domestic origin. Said purchaser may rely on that seller information, without more, to establish the origin of said product."

[1] Note that OCM supports a fundamental regulatory approach presuming that all covered commodities are of domestic origin with a corollary duty for covered entities to track the existing labels of foreign origin products.

These provisions have the advantages of providing clarity to the information transmission process in private transactions as well as lessening the potential for industry abusive practices discussed below.

III. Reduce the Risk of Abusive Industry Practices

The dominant retailers and meat packers have signaled their intent to engage in abusive and unfair practices utilizing the labeling legislation as their justification. Tyson/IBP and Swift & Company are two meatpackers that have written livestock producers to warn them that the companies will require producers to indemnify them should they be fined for violations of the labeling act. These meatpackers have also stated their intention to require suppliers to submit to random audits by them. Tyson/IBP and Swift claim that their retail customers will require similar concessions as to the meat packers.

These activities are fraught with risks of retaliatory conduct, forced disclosures of proprietary information, and excessive, unwarranted cost. The USDA can eliminate the risk of such behavior in the following manner.

First, the rules should provide that the USDA-AMS shall be the sole entity authorized to conduct any audit for verifying compliance.

Second, neither the regulations nor the Act should be interpreted as allowing, supporting or requiring private parties to indemnify other private parties, or as allowing, supporting, or requiring private parties to require any information from suppliers other than a self-verified statement as to the origin of the covered commodity.

These provisions establish the USDA as the sole audit authority and the sole enforcement authority. The "willful" misconduct standard of enforcement (Part I above) will further deter private entities from forcing indemnification upon other entities because: (a) intent is not indemnifiable, and (b) a *de facto* safe harbor for negligent violations is implicit. The rights and responsibilities for providing information (Part II above) further reduce the risk of industry misconduct in this regard.

Thank you for the opportunity to comment.

Very truly yours,

Thomas F. Stokes

Thomas F. "Fred" Stokes
President